

U.S. Foreign Trade Controls Developments and Prospects



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Our Focus

- Recent regulatory developments (Department of Commerce, State, Census Bureau, Customs).
- Enforcement initiatives.
- Deemed export developments.
- Sanctions developments and future outlook:
 - ➔ The end of sanctions in Iraq.
 - ➔ The end of sanctions in Libya.
 - ➔ The end of sanctions in Sudan?
 - ➔ New sanctions on Syria?
- New SEC initiative relating to “T-7” country operations.

Recent Regulatory Developments

- New Administrative Case Review Board;
- New BIS enforcement guidance;
- Proposed Company Transfer License program;
- Deemed export enforcement developments;
- Best practices on transshipments;
- DDTC enforcement priorities;
- Customs advance reporting; and
- Mandatory AES (Automated Export System).



Administrative Case Review Board



- Internal BIS committee that advises the Assistant Secretary for Export Enforcement at important stages of administrative cases;
- Goal of Board is to ensure enforcement decisions are consistent;
- Board has 4 members; 3 review each case:
 1. Deputy Assistant Secretary for Export Enforcement,
 2. Chief Counsel for Industry and Security,
 3. Either the Director of the Office of Antiboycott Compliance or the Office of Export Enforcement (whichever did not investigate the case).
- Board typically meets once a week.

Administrative Case Review Board



- The Board reviews any significant position taken by Export Enforcement in prosecuting administrative case, such as:
 1. Whether to issue charging letter and proposed charges;
 2. What penalties to seek;
 3. Settlement parameters, if appropriate; and
 4. Other important decisions in litigation (e.g., litigation strategy).
- Board meetings are closed to the public; and
- Office of Chief Counsel attorney remains primary contact for suspected violators.

Administrative Case Review Board



More Aggressive Enforcement Posture:

- ➔ Increase in administrative enforcement actions following 9/11.
- ➔ Larger fines for settlements despite voluntary disclosures.
- ➔ BIS enforcement now reaching foreign parties “procuring” U.S. exports in violation of law.
- ➔ For instance, in 2002, two Swiss companies paid \$33,000 civil penalty for conspiracy to transship controlled industrial materials from the U.S. to Iran.



BIS Enforcement Guidance



- On September 17, 2003, BIS published a proposed rule regarding penalty guidance;
- Rule became effective February 20, 2004;
- Rule amends the EAR by incorporating guidance on how BIS makes penalty determinations when settling administrative enforcement case;
- New Supplement No. 1 to part 766 added;
- Supplement No. 1 describes how BIS typically exercises its discretion regarding the terms under which it is willing to settle particular cases.



BIS Enforcement Guidance



- Types of Administrative Sanctions:
 - ➔ **Civil Penalty:** Monetary penalty may be assessed for each violation. Fines are adjusted under the Federal Civil Penalties Adjustment Act of 1990 (currently up to \$12,000).
 - ➔ **Denial of Export Privileges:** Denial may apply to all export privileges or may be limited to exports of specified items or to specified destinations or customers.
 - ➔ **Exclusion from Practice:** Any person acting as an attorney, accountant, consultant, freight forwarder, or other person who acts in a representative capacity in any matter before BIS may be excluded from practicing before BIS.

BIS Enforcement Guidance



■ Mitigating Factors:

- ➔ Voluntary self-disclosure is a “great weight” mitigating factor;
- ➔ Effective compliance program in place;
- ➔ Violation was an isolated occurrence or the result of a good-faith misinterpretation;
- ➔ Required authorization for the export would likely have been granted;
- ➔ Party’s past compliance with the EAR;
- ➔ “Exceptional” cooperation with BIS during investigation; and
- ➔ At the time of the violation, the party: (1) had little or no previous export experience; and (2) was not familiar with export practices and requirements.

BIS Enforcement Guidance



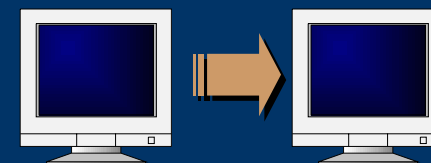
■ Aggravating Factors:

- ➔ The party made a deliberate effort to hide or conceal the violation (“great weight” factor);
- ➔ Conduct demonstrates a serious disregard for export compliance responsibilities;
- ➔ Violation was significant in view of the sensitivity of the items;
- ➔ The quantity and/or value of the exports was high;
- ➔ Past violations or warning letters from BIS;
- ➔ The presence in the same transaction of concurrent violations of laws and regulations, other than those enforced by BIS; and
- ➔ The party exports as a regular part of business, but lacks a systematic export compliance effort.

Proposed Company Transfer License



- BIS expected to propose a new Company Transfer License (CTL) authorizing the release of certain controlled technology to foreign nationals in the United States (deemed exports).
- CTL will also authorize the transfer of controlled technology from a US company to and among its foreign operations.
- As condition for license issuance, company must agree to certain undertakings designed to prevent the unauthorized release of technology (e.g., technology control plan).



Proposed Company Transfer License



- Before drafting proposed rule (which is still undergoing inter-agency review), BIS visited 6 U.S. companies to gauge deemed export best practices;
- Proposed rule will likely be published with “Practical Guide” as a supplement to the EAR;
- Practical Guide will assist exporters develop a Technology Control Plan (TCP);
- TCP must include non-disclosure agreements with all foreign nationals, commitment to controlling technology transfers, and audits;
- Currently, 75% of BIS deemed export licensing burden relates to Chinese and Russian nationals;
- Unclear whether CTL will require foreign company to disclose nationalities of all foreign workers.

Deemed Export Enforcement



- At same time, tightening of deemed export enforcement.
- In April 2004, New Focus, Inc. settles with OEE for \$200,000 stemming from unlicensed shipments of controlled microwave amplifiers to the Czech Republic, Singapore, and Chile.
- Charging letter included violations for failing to obtain deemed export licenses for two Iranian and one Chinese national to whom controlled technology was transferred.
- Deemed export violations voluntarily disclosed by New Focus.
- Assistant Secretary for Export Enforcement stated: *"The settlement in this case sends the strong message that violations of the 'deemed export' provisions will be vigorously pursued."*

Transshipment Best Practices



- Published in November 2003, purpose of best practices is to help industry and forwarders reduce illicit transshipment, transit, or reexport of items subject to the EAR;
- The Transshipment Countries Export Control Initiative (TECI) identified the following as transshipment hubs of particular concern: Cyprus, Hong Kong, Malaysia, Malta, Panama, Singapore, Taiwan, Thailand, and the U.A.E;
- Publication of these best practices creates no legal obligation to comply with such practices; and
- Compliance with best practices creates no defense to liability but considered important mitigating factor in reexport/transshipment case administrative enforcement action.

Transshipment Best Practices



■ Best Practice Examples:

- ➔ Create export compliance program;
- ➔ Identify one person who reports to CEO, General Counsel, or other senior management official as person responsible for oversight of export control compliance program;
- ➔ Train relevant personnel on export compliance;
- ➔ Use of freight forwarders that follow best practices;
- ➔ Communicate ECCN to end-user/ultimate consignee;
- ➔ Screen parties to transaction against denied party lists;
- ➔ Heed Red Flag Indicators on BIS website; and
- ➔ Have in place business procedures against theft and demand delivery confirmation when using “hubs” of concern.

Defense Trade

- State Department:

- ➔ Continued progress in recent months on reduced licensing times.
- ➔ Recently announced new enforcement campaign on ITAR violations.
 - ☑ 2003 fines already in excess of \$63 million.

- Department of Defense:

- ➔ Recently issued IG report under FY 2000 NDAA.
- ➔ Concluded that DoD does not have adequate processes to identify export-controlled technology and prevent unauthorized disclosure to foreign nationals.
 - ☑ Impacts contractors, universities and FFRDCs.
 - ☑ Calls for new guidance and DFARS amendments.

Customs & Border Protection



- Bureau of Customs and Border Protection published proposed regulations requiring advance electronic information on all cargo coming into and leaving the U.S. by sea, rail, air, and truck.
- Except for inbound air cargo, most rules took effect on March 4, 2004.
- Inbound air cargo advanced filing recently delayed.
- Depending on the port, inbound air cargo advance filing requirements take effect in August, October, or December 2004.



Customs & Border Protection



Mode	Inbound Cargo	Outbound Cargo
Vessel	<ul style="list-style-type: none">▪ 24 hours prior to lading at foreign port of departure.	<ul style="list-style-type: none">▪ 24 hours prior to departure.
Air	<ul style="list-style-type: none">▪ 4 hours prior to arrival in the U.S. (Shorter time frame allowed for cargo from certain countries).	<ul style="list-style-type: none">▪ 2 hours prior to scheduled departure.
Rail	<ul style="list-style-type: none">▪ 2 hours prior to arrival at first U.S. port.	<ul style="list-style-type: none">▪ 2 hours prior to arrival at the border.
Truck	<ul style="list-style-type: none">▪ 1 hour prior to arrival at first U.S. Port (30 minutes prior to arrival under the Free and Secure Trade System).	<ul style="list-style-type: none">▪ 1 hour prior to scheduled border crossing.

Mandatory AES



- Electronic SED filing through AES mandatory on October 18, 2003 for all items on the Commerce Control List (CCL) and the United States Munitions List (USML).
- Phase-in for all other items (*i.e.*, EAR99) requiring SED expected in late 2004, early 2005. 180-day grace period expected.
- To become AES filer, exporter must file a letter of intent with the Census Bureau and establish that it possesses certain minimum technical requirements for transmitting electronic information.
- Once export information entered in AES, exporter will receive an Internal Transaction Number (ITN) to give to outbound carrier.

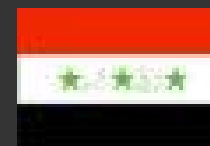


Sanctions Update



■ DEVELOPMENTS:

IRAQ



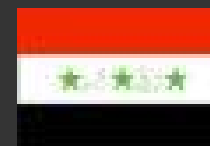
- ➔ Nearly all remaining U.S. sanctions against Iraq lifted in May 2003;
- ➔ Iraq still technically designated by State Department as state-sponsor of terrorism; however, AT-controls under EAR effectively waived;
- ➔ Security Council backs call for independent investigation of misappropriation of funds under now discontinued Oil-for-Food Program.

Sanctions Update



■ WHERE ARE WE HEADED:

IRAQ



- ➔ Situation on the ground in Iraq still too unstable to allow U.S. companies to establish operations in Iraq.
- ➔ Unclear whether U.S. will turn over political control to Iraqi Governing Council by June 30, 2004 deadline.

Sanctions Update



■ DEVELOPMENTS:

LIBYA

- ➔ On April 23, 2004, OFAC issues general license authorizing most previously prohibited transactions with Libya. OFAC action did not take effect until Commerce Department published amendments to regulations.
- ➔ All blocked Libyan assets in the U.S. *remain* blocked.
- ➔ Libya to remain on State Department list of countries sponsoring international terrorism.

Sanctions Update



■ DEVELOPMENTS:

LIBYA



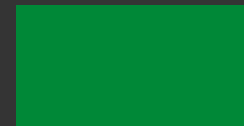
- ➔ On April 29, 2004, Commerce Department publishes amendments to EAR as part of formal transfer of export licensing jurisdiction from OFAC to BIS.
- ➔ Prior BIS licensing not required for EAR99 exports and reexports not destined to or for prohibited end-user/end-use.
- ➔ Items specifically identified on CCL require prior licensing.
- ➔ OFAC licenses now treated as if issued by BIS.
- ➔ In country-transfer of OFAC-licensed item to new end-user requires BIS license.

Sanctions Update



■ WHERE ARE WE HEADED:

LIBYA



- ➔ Additional, phased-in easing possible as Libya continues cooperation and openness regarding WMD program and willingness to satisfy entire commitment to compensate families of Pan Am 103 victims.
- ➔ Removal of Libya from State Department terrorist list unlikely in immediate term.



Sanctions Update



■ DEVELOPMENTS:



- ➔ State Department still considers Iran the most active state sponsor of terrorism; pressure on Russia to cease arms sales.
- ➔ Since 2003, various companies under pressure from NYC pension funds and other investors to acknowledge financial and reputational risks from doing business in a country that the US considers a state sponsor of terrorism.

Sanctions Update



■ DEVELOPMENTS:



- ➔ Iran admits to IAEA in 2003 that it received foreign help in building a secret nuclear facility South of Tehran; after considerable tension, Iran admits inspectors.
- ➔ Domestic political instability in Iran complicates any easing of U.S.-Iran tensions and strengthens U.S. hawks.
- ➔ February 2004 State Department report on ILSA notes that legislation has been “mildly” effective in discouraging investment but “irritant” in U.S. relations.

Sanctions Update



■ DEVELOPMENTS:



- ➔ Leading Pakistani nuclear scientist, Abdul Qadeer Khan, admits in 2004 to leaking nuclear secrets to Iran.
- ➔ U.S. imposes sanctions on 13 entities in April 2004 under the Iran Nonproliferation Act of 2000 for selling equipment to Iran that could be used to build nuclear, chemical, and biological weapons.
- ➔ Sanctioned company break-down: Five Chinese companies, two Macedonian, two Russian and one each from Belarus, North Korea, Taiwan, and the U.A.E.

Sanctions Update

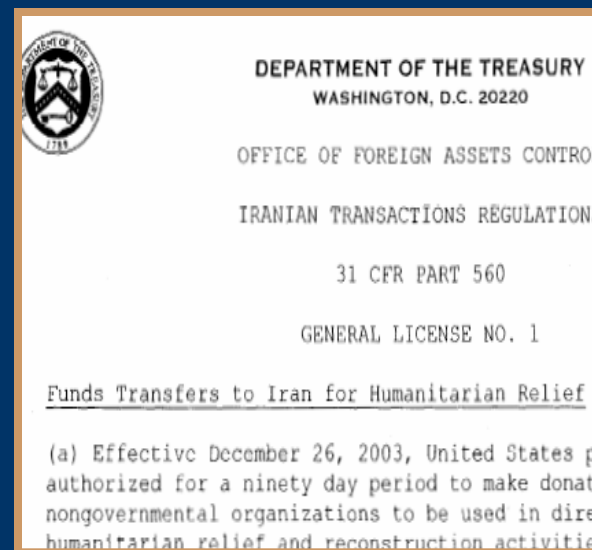


■ WHERE ARE WE HEADED:

IRAN



- ➔ In late 2003, OFAC issued a 90-day general license authorizing cash donations to nongovernmental entities engaged in humanitarian relief activities in response to the earthquake in Bam. This move welcomed in Iran.
- ➔ Despite the IAEA protocol, U.S. still sees Iran as active threat. Prospect for improved relations not particularly favorable in immediate term.



Sanctions Update



■ DEVELOPMENTS:



- ➔ In 2003, peace deal between the North and South appeared within reach.
- ➔ President Bush indicated that if a comprehensive peace agreement could be signed, he would consider lifting or substantially easing unilateral U.S. economic sanctions.
- ➔ Conflict in Western Darfur region of Sudan has been raging, although uneasy truce in place.
- ➔ U.S. government has recently suggested that the U.S. may not normalize relations with Sudan unless and until the Sudanese government resolves the situation in Darfur.

Sanctions Update



■ WHERE ARE WE HEADED:

- ➔ So long as the *status quo* remains in Darfur, the U.S. might find it difficult to have confidence in a North-South peace agreement;
- ➔ Darfur conflict has the potential to undermine the North-South peace process altogether.

SUDAN



Sanctions Update



■ DEVELOPMENTS:



- ➡ In 2003, Congress considered but did not adopt several measures to curtail enforcement of the Cuban travel ban.
- ➡ President Bush in October 2003 reaffirmed commitment on travel ban to Cuba and resolved to enforce it.

■ WHERE ARE WE HEADED:

- ➡ Near-term change very unlikely.

Sanctions Update



■ DEVELOPMENTS:

NORTH
KOREA



- ➔ Imports from North Korea continue to require prior OFAC authorization;
- ➔ North Korea remains identified by State Department as state-sponsor of terrorism; non-EAR99 items require DoC licensing.

■ WHERE ARE WE HEADED:

- ➔ Relations not improving. North Korea threatened in 2003 that comprehensive economic sanctions would mean “war.”

Sanctions Update



■ DEVELOPMENTS:

SYRIA



- ➔ President Bush signed Syria Accountability and Lebanese Sovereignty Restoration Act into law in December 2003 (SAA);
- ➔ Law halts licensing of CCL-controlled and ITAR items;
- ➔ BIS circulating “General Order” to other agencies;
- ➔ Law also directs President to select at least 2 of a possible 6 additional sanctions;
- ➔ Law includes presidential waiver authority on national security grounds.

Sanctions Update



■ SAA SANCTIONS MENU:

SYRIA



1. Prohibition on the export of all U.S. products other than food and medicine;
2. Prohibition on U.S. businesses investing or operating in Syria;
3. Restriction on travel by Syrian diplomats in the United States;
4. Prohibition on Syrian air traffic in or over the United States;
5. Reduction of diplomatic contacts with Syria; and
6. Blocking transactions in property in which Syria has an interest.

Sanctions Update



■ DEVELOPMENTS:

SYRIA



- ➔ Upon signing SAA, President issued a statement rejecting the authority of Congress to force his hand on sanctions;
- ➔ DoC observing moratorium on licensing for CCL-controlled items.

■ WHERE ARE WE HEADED:

- ➔ White House action on menu-driven sanctions still possible in coming weeks; reportedly delayed due to Middle East turmoil;
- ➔ Trade sanctions, not diplomatic sanctions, are expected.

Sanctions Update



■ DEVELOPMENTS:

BURMA



- ➔ U.S. sanctions tightened as a result of junta's detention of opposition leader Aung San Suu Kyi;
- ➔ As of August 2003, import ban on Burmese-origin products (limited carve-out for informational materials and household effects);
- ➔ Junta property holdings and financial assets in U.S. banks frozen;
- ➔ Regulations implementing sanctions not yet published by OFAC;
- ➔ State Department released report stating that between 30,000-40,000 jobs have been lost in Burma's garment sector as a result of sanctions.

New SEC Initiative



- ➔ Conference Report accompanying the FY 2004 SEC appropriations bill establishes new SEC office to monitor operations of U.S.-listed companies in T-7 countries;
- ➔ Rep. Frank Wolf of Virginia is the major proponent of this new office;
- ➔ New Office is called Office of Global Security Risk and will be part of Division of Corporate Finance. Its responsibilities include:
 - ▶ Develop a process that will allow the SEC to “identify all companies on U.S. exchanges operating in” terrorist-sponsoring states designated by the State Department;

New SEC Initiative



- ▶ To ensure that all companies traded on U.S. exchanges and operating in terrorist states disclose such “activities” to investors;
- ▶ To implement “enhanced disclosure requirements based on the asymmetric nature of the risk to corporate share value and reputation stemming from business interests in these higher risk countries”;
- ▶ To coordinate with other government agencies to ensure the “sharing of relevant information across the federal government”;
- ▶ To “initiate a global dialogue to ensure that foreign corporations whose shares are traded in the United States are properly disclosing their activities in State Department-designated terrorist states to American investors.”

New SEC Initiative



■ WHERE ARE WE HEADED:

- ➔ SEC recruiting five staff members for new office;
- ➔ SEC currently review annual filings by ConocoPhillips, Motorola, and Devon Energy that disclosed operations or investments in Syria;
- ➔ OFAC has sent out demand letters to a number of companies inquiring about T-7 operations, which were disclosed in SEC filings (e.g., 10-K, 10-Q);
- ➔ Pension funds putting pressure on U.S.-listed companies to end ties with T-7 countries (e.g., G.E. and Halliburton under pressure and ConocoPhillips agreed to cut ties in Iran and Syria).

Questions?



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